No 94418-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

OSCAR LOPEZ,

Petitioner.

BRIEF OF WACDL AS AMICUS CURIAE OBO PETITIONER, OSCAR LOPEZ

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WACDL Amicus Committee

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A. Identity of Petitioner

The Washington Association of Criminal Defense Lawyers (WACDL) seeks to appear in this case as *amicus curiae* on behalf of petitioner Oscar Lopez. WACDL is a professional association made up of Washington criminal defense lawyers, public and private, founded in 1987 with over 1000 members. It was formed to promote fairness and equity in the criminal justice system and files this brief in pursuit of that mission.

B. Counterstatement of Issues

1. Reserved

2. Whether the trial court's granting of a new trial, which is entitled to a "much stronger showing" of deference than denial of a new trial, should be reinstated based upon its determination that defense counsel's severe depression affected his performance before and during the trial?

C Argument

This Court has granted review to a Court of Appeals decision reversing an order for new trial. The trial court ordered a new trial based upon its determination that defense counsel was ineffective at the time of trial. The trial court cited two reasons for finding ineffective assistance of counsel: (1) defense counsel failed to call witnesses to attest to his client's reputation and good character pursuant to ER 404(a)(1); and (2) defense

counsel was suffering from a mental illness that affected his performance before and during trial. WACDL submits this brief to address the second issue only.

The Sixth Amendment Right to Counsel includes the right to effective assistance of counsel. As interpreted by the landmark case, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this normally requires two things: deficient performance by defense counsel and demonstrated prejudice. The Court of Appeals reversed the trial court because it did not discern from the transcripts that Mr. Lopez' attorney was either deficient or that he was prejudiced by his attorney's mental illness.

This brief addresses two issues related to defense counsel's mental illness. First, when a trial court grants a new trial based upon its determination that defense counsel's mental illness affected the fairness of a criminal trial, that order is entitled to a much stronger showing of an abuse of discretion before it is reversed. Second, when a trial court determines defense counsel's mental illness rendered his trial performance deficient under *Strickland v. Washington*, such a conclusion should be deemed structural error and the prejudice prong normally required by *Strickland* need not be shown.

At the time of Mr. Lopez' trial, defense counsel was suffering from severe depression and was suicidal. During the trial, he was repeatedly tardy to court and when he did arrived, he was often not prepared. At the end of the trial, the trial court sanctioned defense counsel $500, $250 for tardiness and $250 for being unprepared. 6RP, 525-26. Defense counsel was disbarred two months after the trial.

After trial, defense counsel's mental illness came to light. His long time investigator filed a declaration with the trial court opining that counsel's mental illness had a tangible impact on his performance in the case. The trial court determined that the declaration was relevant not just to defense counsel's performance during the actual trial, but his "handling of the entire case, including pretrial investigation and communications with his client." 11RP, 1312. Based upon all the information available to it, the trial court concluded, "[I]t is fairly obvious that Mr. Witchley was severely handicapped by his depression both before and during the trial. And as he told [the investigator] Ms. Sanderson, he shouldn't have taken the case to trial because he was not emotionally capable of working on it." 11RP 1316.

Although the trial court struggled to find specific instances where defense counsel was deficient (other than the failure to call character witnesses), the trial court looked at all the available information, including

the court's personal observations at trial, defense counsel's tardiness and unpreparedness, the declaration from the investigator, and the admissions of defense counsel, and concluded there was sufficient reason to question the fairness of the trial. As the trial court put it, "But it is also I think fairly clear that had he not been handicapped by his depression, he would have been more effective. And even though the court finds it difficult to make any conclusions on a more probable than not basis as to what the result would have been had Mr. Witchley been functioning at full capacity, it seems to the court that, as a matter of due process, a defendant is entitled to be represented by somebody who is not suffering from mental illness." 11RP, 1317-18.

The Court of Appeals reversed, citing three cases from the federal Court of Appeals holding that reversal is not per se required when there is evidence of mental illness. This Court should reverse the Court of Appeals.

The three federal cases cited by the Court of Appeals are easily distinguishable. In *Johnson v. Norris*, 207 F.3d 515 (8th Cir. 2000), defense counsel was diagnosed with bi-polar disorder six years after the trial and the federal District Court was not persuaded the disorder manifested itself during the trial. In *Smith v. Ylst*, 826 F.2d 872 (9th Cir. 1987), the federal District Court did not believe the allegations of mental

illness were sufficient to merit a hearing. *Dows v. Woods*, 211 F 3d 480 (9th Cir. 2003), a Washington state rape prosecution, involved an application of the Antiterrorism and Effective Death Penalty Act (AEDPA), which required the Court to find that the Washington Courts made a decision that was contrary to, or an unreasonable application of clearly established Federal law. Given that there is no United States Supreme Court case finding per se ineffective assistance when defense counsel suffers from a mental illness, this was an easy ruling.

Although the three cited federal cases are distinguishable and not binding on this Court, WACDL does agree with Court of Appeals on one point: there should not be a per se finding of ineffective assistance of counsel when defense counsel suffers from a mental illness. Many wonderful lawyers, including WACDL members, suffer from diagnosed mental illnesses and are able to provide competent and even extraordinary representation of criminal defendants. Mental illness is a broad term and encompasses many diagnoses and severities. Many mental illnesses can be effectively managed with professional help, such as medication and therapy, as well as a variety of self-help programs, such as diet and meditation. As pointed out by the Eighth Circuit, "Bi-polar disorder, like most mental illnesses, can have varying effects on an individual's ability to function, and the disease can vary widely in the degree of its severity."

Johnson v. Norris, 207 F.3d at 518. WACDL is not aware of any appellate court that has created a per se prohibition on attorneys with mental illnesses representing defendants and this Court should not be the first.

Although WACDL agrees there should not be a per se prohibition on mentally ill attorneys, WACDL disagrees with the manner in which the Court of Appeals substituted its judgment for that of the trial court. It has been frequently said that appellate courts should not weigh the evidence or substitute their judgment for that of the trial court simply because they would have made a different decision. *State v. Sizemore*, 48 Wn.App. 835, 837, 741 P.2d 572 (1987).

The Court of Appeals correctly began its analysis by citing the principle that an order granting or denying a motion for new trial is judged on an abuse of discretion standard. *Lopez*, citing *State v. Jackman*, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). But the Court of Appeals ignores the second half of this principle. Although an order granting or denying a motion for new trial is judged by an abuse of discretion standard, Washington law is also clear that a "much stronger showing of an abuse of discretion will ordinarily be required to set aside an order granting a new trial than one denying a new trial." *State v. Slanaker*, 58 Wn.App. 161, 163, 791 P.2d 575 (1990) (citations omitted). This principle is cited in

scores of cases and has existed unabated for well over a century. *Walgraf v. Wilkeson Coal and Coke Co.*, 65 Wn. 464118 P. 343 (1911).

Although Washington case law clearly and repeatedly iterates the principle that the granting of a new trial is entitled to a "much stronger showing" of deference, there appears to be little discussion in the cases for the reasons underlying this rule, prompting Division III of the Court of Appeals to remark, "However, logic and a cursory statistical review of actual decisions suggest otherwise." *State v. Marks*, 90 Wn.App. 980, 955 P.2d 406 (1998). The Court continued, "[D]ecisions granting or denying a motion for a new trial usually rest on questions of law and the application of a rule of law, rather than the trial judge's assessment of the evidence or the impact of that evidence on the jury. *Marks* at 984. The *Marks* Court suggests that when the order granting a new trial rests entirely on the application of a rule of law, the appellate court should not review the order any differently than if the new trial were denied.

WACDL takes issue with the suggestion in *Marks* that an order denying a new trial is entitled to the same deference as an order granting a new trial. Some legal issues involve principles of law that are easily reviewed later and some are like a spontaneous joke that, when retold, fall flat. We even have a phrase for that in common parlance, "Guess you had to be there." There are some issues at trial that qualify as "you had to be

there" moments. One example is challenges for cause to potential jurors, where the "trial judge is in the best position upon observation of the juror's demeanor to evaluate the responses and determine if the juror would be impartial." *State v. Brown*, 132 Wn.2d 529, 602, 940 P.2d 546 (1997). This Court should find that the issue of whether defense counsel's mental illness materially affected the trial is a "you had to be there" moment best determined by the trial court and entitled to a "much stronger showing" of deference on appeal.

Although Washington has apparently never discussed the reason for the "much stronger showing" rule, the Kansas Courts have. The Kansas Supreme Court explained the rule as follows, "Trial courts are invested with a very large and extended discretion in the granting of new trials; and new trials ought to be granted whenever in the opinion of the trial court the party asking for the new trial has not in all probability had a reasonably fair trial, and has not in all probability obtained or received substantial justice, although it might be difficult for the trial court or the parties to state the grounds for such new trial upon paper so plainly that the supreme court could understand them as well as the trial court and the parties themselves understood them. The supreme court will very seldom, and very reluctantly, reverse a decision or order of the trial court which grants a new trial. A much stronger case for reversal must be made when

the new trial is granted than where it is refused." *Bateman v. Roller*, 168 Kan. 111, 211 P.2d 440 (1949), citing *City of Sedan v. Church*, 29 Kan. 190 (1883).

Mr. Lopez' case reflects the type of case, as discussed in *Bateman v. Roller*, where it is "difficult for the trial court or the parties to state the grounds for such new trial upon paper." The trial court had the opportunity to observe defense counsel every day for the duration of the trial. The trial court was very upset that defense counsel seemed unable to get himself out of bed in time to be at court in a timely fashion, only to arrive to trial unprepared, but was apparently unaware of the reason until after the trial. Relying on the court's own observations, the declaration of the defense investigator, as well as the admissions of defense counsel himself, the trial court's opinion was that Mr. Lopez "has not in all probability had a reasonably fair trial, and has not in all probability obtained or received substantial justice." As the trial court put it, he was entitled to a new trial as a "matter of due process." RP, 1317.

Although appellate courts have not created a per se rule for defense attorneys suffering from mental illness, they have left open the possibility that a mentally ill attorney might require reversal on a case-by-case basis. In *Smith v. Ylst*, the Ninth Circuit held, "We hold that when there is a question about a defense attorney's mental competence, a hearing is

required when there is substantial evidence that an attorney is not competent to conduct an effective defense." *Smith* at 877. Under this rule, if the trial court in the exercise of its discretion determines that defense counsel was not competent due to mental illness, the remedy is to order a new trial. That is precisely what the trial court did in Mr. Lopez' case and the Court of Appeals erred by substituting its judgment for that of the judge who sat through the entire trial.

The Court of Appeals expended considerable ink in its decision commenting on the trial court's mention of "due process" in its oral decision. The Court of Appeals seemed to believe this was a reference to the Fourteenth Amendment Due Process Clause. The Court of Appeals was very critical of this because ineffective assistance of counsel is a very specific legal principle grounded in the Sixth Amendment and *Strickland*, not the Fourteenth Amendment Due Process Clause. *Strickland v Washington*, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). But in context, the trial court's mention of "due process" was not a reference to the Fourteenth Amendment Due Process Clause, which has a highly specific body of case law, but to the generalized "due process" referred to as "substantial justice" in *Bateman*.

The next issue is, after a trial court's determination that defense counsel's mental illness rendered his performance at trial deficient, how

should the prejudice prong of *Strickland* be addressed. When an attorney suffers from a mental illness that renders him or her incompetent at trial, this Court should find that the error is structural. Although structural error is generally disfavored by the appellate courts, a finding that the defendant was deprived entirely of defense counsel has been consistently found to be structural. *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Examples of this include *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (deprival of counsel of choice structural error); *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (prejudice need not be shown when defense counsel had an actual conflict of interest); and *Javor v. United States*, 724 F.2d 831, (9th Cir. 1984) (defense counsel slept through substantial portions of the trial).

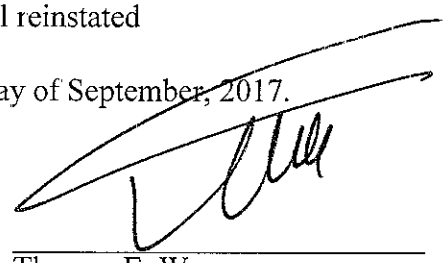
Structural errors are errors that "defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself." *Gonzalez-Lopez* at 149 (citation omitted). It is impossible to evaluate after the fact whether the strategy of a mentally ill attorney was prejudicial or not. As Justice Scalia said in an analogous situation, "Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of

the witnesses, and style of witness examination and jury argument." *Gonzalez-Lopez* at 150. In Mr. Lopez' case, it is impossible to determine how defense counsel's debilitating, suicidal depression affected his performance in the case, both before and during trial. The trial court found it affected his "handling of the entire case, including pretrial investigation and communications with his client." RP, 1312. The error was structural and a new trial is required.

D Conclusion

The holding of the Court of Appeals should be reversed and the order of the trial court granting a new trial reinstated.

Respectfully submitted this 26th day of September, 2017.



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September 26, 2017 - 3:42 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Oscar Raul Lopez
Superior Court Case Number:	14-1-04275-9

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